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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 595

MRS. FANNIE E. LANG, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 4, 1933

CERTIORARI GRANTED FEBRUARY 6, 1933

(37,292)

(37,292)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 24, 1933

[fol. a-1] **BEFORE UNITED STATES BOARD OF TAX APPEALS**

Docket No. 43518

Mrs. Fannie E. Lang, Petitioner,

vs.

Commissioner of Internal Revenue, Respondent

Appearances:

For petitioner: Washington Bowie, Jr., Esq.
For respondent: O. J. Tall, Esq.

Docket Entries

1929.
Apr. 6. Petition received and filed. Taxpayer notified. (Fee paid.)
Apr. 8. Copy of petition served on General Counsel.
May 22. Answer filed by General Counsel.
May 29. Copy of answer served on taxpayer—General Calendar.

1930.
Aug. 21. Hearing set Nov. 5, 1930.
Oct. 31. Motion for continuance of 60 days filed by taxpayer. Nov. 1, 1930 granted to 12/1/30.
Dec. 1. Hearing had before Mr. Arundell on the merits. Briefs due Feb. 2, 1931. Written stipulation of facts filed.
Dec. 2. Amended answer filed by General Counsel.

1931.
Jan. 22. Transcript of hearing 12/1/30 filed.
Jan. 30. Brief filed by General Counsel.
Jan. 30. Brief filed by taxpayer.
Jan. 24. Findings of fact and opinion rendered—Mr. Arundell, Div. 7. Decision will be entered under Rule 50.

[fol. 2]
July 16. Notice of settlement filed by General Counsel.
July 18. Hearing set Aug. 5, 1931 on settlement.
July 31. Consent to settlement filed by taxpayer.
Aug. 7. Decision entered—Mr. Smith, Division 5.

1932.

Feb. 1. Supersedeas bond in the amount of $2,711.00 approved and ordered filed.

Feb. 1. Petition for review to U. S. Circuit Court of Appeals (4) with assignments of error filed by taxpayer.

Feb. 1. Proof of service filed.

Mar. 30. Praecipe with proof of service filed.

Mar. 31. Copy of order from Fourth Circuit Court of Appeals enlarging time for a period of ten days to prepare and deliver documents filed.

April 9. Order entered extending the time for transmission and delivery of the record to April 16, 1932.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION—Filed April 6, 1929

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT: AR: B-1: FMA-60D) dated February 6, 1929, and as a basis of her proceeding alleges as follows:

1. The petitioner is a widow residing at 118 Beaumont Avenue, Catonsville, Maryland.

2. The notice of deficiency (a copy of which is hereto attached and marked Exhibit A) was mailed to the petitioner on February 6, 1929.

[fol. 3] 3. The taxes in controversy are income taxes for the calendar year 1925, and for the entire sum stated in said notice, namely, Twelve Hundred and Thirty-two Dollars and Eighty-four Cents ($1,232.84).

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

First. The item of additional income alleged to be profit or gain from the sale of real estate is for the greater part, founded upon the sale of residence property known as

"Glen Alpine," and respondent is in error as to the correct basic-value in the hands of petitioner for income tax purposes, in that his computation is based upon a Bureau ruling which the petitioner contends is illogical, arbitrary, capricious and discriminatory, for the reason that it fails to give proper recognition to the circumstances and conditions under which the petitioner both acquired and sold the property, involving, among other things, the proceeds of sale actually received by petitioner after liquidation of mortgage indebtedness incurred by petitioner's husband prior to his decease.

Second. With respect to disallowances for interest and other deductions claimed by petitioner in her tax return, respondent is in error as to the facts and figures underlying said deductions, and his conclusions as to what part had accrued prior to the death of petitioner's husband are, likewise, erroneous.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The residence property known as "Glen Alpine" was originally purchased in 1915 at a cost of $13,000 and, at the direction of petitioner's husband, the deed thereto vested the title in Walter B. Lang and Fannie E. Lang, his Wife, as tenants by the entireties. Of the cost price, petitioner contributed $1,560 (12%) from her personal funds, and the balance was paid by the husband out of his personal funds. Permanent improvements were made at a cost of $1,500 all of which was paid by the husband personally. Some years later the husband borrowed $20,000 for his own use and purposes, in no manner related to this [fol. 4] residence, but secured said loan by a mortgage on said residence. At the time of the husband's death in 1924 this residence had a market value of $40,000 against which there remained an unpaid balance of $18,672.50 under the mortgage, and in compliance with the requirements of the Revenue Act of 1924 this property was duly included in arriving at value of the husband's net estate for purposes of the Federal Estate Tax. After her husband's death the petitioner made payments on this mortgage loan and had reduced the balance to $17,675.00 when she sold the residence on or about July 1, 1925 for $40,000

from which said sum of $17,675 was withheld, leaving $22,325 as the saleprice received by the petitioner.

(b) Of the expenses connected with the sale of a tract known as "Rollingside" (ignored by the respondent in his computations), $2,630.48 was the amount of commissions accrued at the date of death of petitioner's husband, and this amount was included in the liabilities of his estate. The balance of the expenses, amounting to $52.80, were incurred and paid by the petitioner personally.

(c) Of the total amount of interest paid by the petitioner in 1925, only $2,864.52 had accrued prior to her husband's death, and this amount was included in the liabilities of his estate.

(d) Of the total amount of taxes paid by the petitioner in 1925, $761.96 had accrued prior to her husband's death, and this amount was included in the liabilities of his estate.

(e) The deduction of $2,416.50 claimed by the petitioner in her tax return and disallowed by the respondent, has no relation to the sale of the residence property. Nevertheless, it represented accrued expenses included among the liabilities of the husband's estate and paid by the petitioner in 1925.

Wherefore the petitioner prays that this Board may hear the proceeding; that a redetermination of the deficiency (if any) be made in accordance with the contentions [fol. 5] of the petitioner and the facts herein presented; and for such other and general relief as this Board may deem proper and equitable.

(S.) Washington Bowie, Jr., Counsel for Petitioner.
Washington Bowie, Jr., 616 Fidelity Bldg., Baltimore, Md.

Duly sworn to by Fannie E. Lang. Jurat omitted in printing.

EXHIBIT "A" TO PETITION

(1)

Treasury Department, Washington

Office of Commissioner of Internal Revenue

Feb. 6, 1929.

Address reply to Commissioner of Internal Revenue and refer to ——.

[fol. 6] Mrs. Fannie E. Lang, 36 Melvin Avenue, Catonsville, Maryland.

MADAM: In accordance with Section 274 of the Revenue Act of 1926, you are advised that the determination of your tax liability for the year 1925 discloses a deficiency of $1,232.84, as shown in the statement attached.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed Form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement form will expedite the closing of your return by permitting an early assessment of any deficiencies and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the agreement form, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiencies.

Respectfully, D. H. Blair, Commissioner, by (Signed) C. B. Allen, Deputy Commissioner.

Enclosures: Statement, Form 866, Form 882.

[fol. 7] Exhibit A

(2)

Statement

IT:AR:B-1. FMA-60D

Feb. 6, 1929.

In re Mrs. Fannie E. Lang, 36 Melvin Avenue, Catonsville, Maryland

Tax Liability

Year	Corrected tax liability	Tax previously assessed	Deficiency
1925	$1,232.84	None	$1,232.84

The report of the Internal Revenue Agent in Charge at Baltimore, Maryland, covering the verification of your income tax return for the year 1925, has been reviewed and approved by this office as submitted disclosing the following adjustments:

Loss disclosed by your return		$5,606.92
Add:		
1. Increase in profit from sale of real estate	$23,943.28	
2. Interest paid, decreased	3,583.71	
3. Deductions disallowed	2,416.50	
		29,943.49
Adjusted net income		$24,336.57
Less:		
Dividends	$166.68	
Personal exemption and credit for dependents	4,300.00	
		4,466.68
Income subject to normal tax		$19,869.89

[fol. 8] Computation of Tax

Normal tax at 1½% on $4,000.00		$60.00
Normal tax at 3% on 4,000.00		120.00
Normal tax at 5% on 11,869.89		593.49
Surtax on $24,336.57		463.56
Total Tax		$1,237.05
Less:		
Earned income credit	$2.63	
Tax paid at source	1.58	
		4.21
Tax liability shown on Form 866		$1,232.84

Exhibit A

(3)

Mrs. Fannie E. Lang, Statement

Brought forward	$1,232.84
Tax previously assessed	None
Proposed deficiency	$1,232.84

Explanation of Changes

1. This item represents the profit realized by you on the sale of a residence acquired in 1915 by you and your husband in entirety. In determining this profit, the cost of the property in 1915 has been used in accordance with Income Tax Ruling #1635 reported in Internal Revenue Cumulative Bulletin II-1, Page 19. Details of this transaction are fully set forth in the revenue agent's report, a copy of which was furnished you.

2. Interest in the amount of $3,583.71 accrued to the date of your decedent husband's death has been disallowed as a deduction from your gross income.

3. This item is comprised of the amount of $392.75 expending for grading which has been disallowed for the reason that it is held to constitute a capital expense, and $2,023.75, advertising commissions, the latter being taken

[fol. 9] into consideration in determining the profit from the sale of the residence.

Due to the fact that the statute of limitations will presently bar any assessment of additional tax against you for the year 1925, the Bureau will be unable to afford you an opportunity under the provisions of Treasury Decision 3867 to discuss your case before mailing formal notice of its determination as provided by Section 274(a) of the Revenue Act of 1926. It is, therefore, necessary at this time, in order to protect the interests of the Government, to issue this formal notice of deficiency.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

ANSWER—Filed May 22, 1929

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3.

4. First and Second. Denies the allegations of error contained in paragraphs 4. First and Second.

5. (a) to (e), inclusive. For lack of information sufficient to form a belief, denies the allegations contained in paragraphs 5 (a) to (e), inclusive.

[fol. 10] 6. Denies generally and specifically each and every allegation of the petition not hereinbefore admitted or denied.

Wherefore it is prayed that the appeal be denied.

(Signed) C. M. Charest, General Counsel, Bureau of Internal Revenue.

Of counsel:
Hartford Allen, Hugh Brewster, Special Attorneys, Bureau of Internal Revenue.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

AMENDED ANSWER—Filed Dec. 2, 1930

Comes now the Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, pursuant to a motion made at the hearing in the above-entitled case to amend his answer heretofore filed, admits, denies and avers as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits that the taxes in controversy are Federal income taxes for the calendar year 1925 but denies that the [fol. 11] amount in controversy is the amount set forth in paragraph 3 of the petition.

4. Denies that the respondent erred in the determination of the deficiency as alleged in paragraph 4 of the petition.

5. Denies each and every allegation of fact contained in paragraph 5 of the petition.

6. Avers that the respondent in determining taxable net income for the year 1925, according to the notice of deficiency, allowed the sum of $2,500.00 for improvements to the property in question prior to its sale, whereas the improvements actually made cost only $1,500.00, and that taxable income according to the notice of deficiency should, therefore, be increased by the amount of $1,000.00 (paragraph 3 of the stipulation of facts filed at the hearing).

7. Avers that the respondent in determining the taxable net income for the year 1925, according to the notice of

deficiency, allowed a deduction for local taxes paid by the petitioner in 1925 in the amount of $1,431.93 and that such amount was excessive to the extent of $761.96, and that taxable net income as disclosed by the notice of deficiency should, therefore, be increased by $761.96 (paragraph 8 of the stipulation of facts filed at the hearing) (oral stipulation as to local taxes).

Wherefore it is prayed that petitioner's appeal be denied.
(Signed) C. M. Charest. C. M. Charest, General Counsel, Bureau of Internal Revenue.

Of counsel.
O. J. Tall, Special Attorney, Bureau of Internal Revenue.

amm.
12-2-30.

[fol. 12] 23 B. T. A., —

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 43518

MRS. FANNIE E. LANG, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Promulgated June 24, 1931

Findings of Fact and Opinion

Real estate acquired in 1915 by petitioner and her husband as tenants by the entirety was sold by the surviving widow in 1925. Held that the basis for determining gain on the sale is the cost of the property at the time of acquisition.

Washington Bowie, Esq., for the petitioner.
O. J. Tall, Esq., for the respondent.

Proceeding for the redetermination of a deficiency of $1,232.84 in income tax for 1925. The issues are whether

the basis for computing the profit realized or loss sustained on the sale by petitioner in 1925 of real estate acquired in 1915, and held with her husband as tenants by the entireties, should be (a) cost, or (b) market value at the time of her husband's death, and the proper amount allowable as a deduction for interest. By an amended answer respondent asks that the proposed deficiency be increased by reason of an excessive allowance for improvements made on the property sold, and local property taxes. The facts were stipulated.

Findings of Fact

In 1915 Walter B. Lang and his wife, the petitioner, purchased a piece of residential property in Catonsville, Maryland, at a cost of $13,000, of which amount the husband contributing $11,440 and the petitioner $1,560. Title [fol. 13] was taken by the purchasers as tenants by the entireties. Thereafter certain permanent improvements were made on the property at a cost of $1,500, all of which was paid by the husband.

Petitioner's husband died in 1924. The real estate then had a market value of $40,000. The petitioner was executrix and the sole beneficiary of his estate.

The real estate was included in the estate tax return filed by the petitioner, as executrix, at $35,200, this being 88 per cent of the value at the time of death, which percentage represents the portion of cost paid by the decedent. A Federal estate tax was paid based on the net estate as returned by the executrix.

The real estate was sold by petitioner on or about July 1, 1925, for $40,000. The selling expenses amounted to $2,055.80, which amount has been allowed by the respondent in determining the profit realized on the sale.

In 1925 petitioner paid and deducted in her return for that year, interest charges amounting to $6,298.49, of which the sum of $2,846.52 had accrued prior to her husband's death and was included in the liabilities of his estate. In that year she also paid, and claimed as a deduction in her return, the sum of $1,431.93 for local property taxes. Of this amount $761.96 had accrued prior to her husband's death, and was included among the liabilities of his estate.

In his determination of the deficiency respondent (a)

used cost in 1915 as a basis for computing the amount of profit realized on the sale of the real estate and in his computation allowed $2,500 for improvements to the real estate; (b) disallowed $3,583.71 of the interest deduction on the ground that such amount had accrued prior to the death of petitioner's husband, and (c) allowed the sum of $1,431.93 as a deduction for local property taxes.

OPINION

ARUNDELL:

Petitioner claims that, by reason of the property being held by the entireties, the basis for determining the taxable [fol. 14] gain on the sale is the sum of the cost contributed by her ($1,560) and the value of her husband's interest in it at the time of his death ($35,200) a total of $36,760. Respondent has used as a basis the cost in 1915 in the amount of $13,000.

The question here raised has been decided by the Board adversely to petitioner's contention in Elizabeth W. Boykin, 16 B. T. A. 477, but that was before Tyler v. United States, 281 U. S. 497, and at a time when the Board's position was that estates by the entirety might not be included in the gross estate for the imposition of an estate tax. Petitioner relies on the Tyler case, but, as we view that decision, it is not decisive of the question here presented. It is true that in that case the Supreme Court was not disposed to allow the fiction of the unity of husband and wife to stand in the way of the inclusion in the gross estate of an estate by the entirety to the extent and in the manner provided for in the statute. It was said in that case that, "The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions." The conclusion of the court was not that upon death the survivor takes by an outright transfer, as that word is commonly understood, but that death is the generating source of an enlargement of property rights which Congress might and did include within that class of happenings upon which an estate tax is imposed.

A part of petitioner's argument is that the survivor takes by inheritance. But this is not the law as we understand it. The rights of both husband and wife originate in the deed of conveyance. Under it each takes "not by

moieties, but the entirety." Ades v. Caplan, 132 Md. 66; 103 Atl. 94. The interest of the wife in the whole property under the deed during the lifetime of the husband is so much hers that it cannot be subjected to the debts of the husband. McCubbin v. Stafford, 85 Md. 378; 37 Atl. 214. The only effect of the death of one of the tenants is to remove the restrictions with which the ownership of the other was hedged about; it does not change the source of ownership, namely, the deed of conveyance. The Supreme Court in the Tyler case recognized the State law to be as we have [fol. 15] just stated it, and said, moreover, that those decisions were binding on it.

It is also argued that imposition of a tax on the sale of the property will result in double taxation because of the fact that the same property was included in the decedent's estate, and an estate tax paid. Discussing a similar argument in Ernest M. Bull, Executor, 7 B. T. A. 993, 1000, we said:

But there is no warrant for the assumption of mutual exclusion. The two taxes are different in kind and incidence, and if when properly applied they each produce revenue in respect of the same matter, that fact alone does not militate against either levy. Double tax is of course not to be presumed (see Nichols v. United States, Court of Claims, April 4, 1927; 6 Am. Fed. Tax. Rep. 6592) and ought to be avoided if doubtful, but if clear it is not invalid. This may be illustrated by the plain overlapping of the capital stock tax and the income tax. The former is measured by the actual value of capital stock. Such value frequently reflects earnings which at the same time measure the income tax. But the earnings when derived are not less subject to income tax because they have given taxable value to capital stock. A similar impinging of the inheritance tax and the income tax upon the same factor of value will be found in the two decisions of the Supreme Court in United States v. Fidelity Trust Co., 222 U. S. 158, and Irwin v. Gavit, 268 U. S. 161; 5 Am. Fed. Tax Rep. 5380.

Moreover, in the present case the two taxes fall on different persons; the estate tax on decedent's estate, and the income tax on the petitioner. If the argument of petitioner were sound, it would be equally sound to say that that portion of a man's income which he saves and which eventually becomes a part of his estate should not be subject to

an estate tax because he has once paid an income tax on it.

The primary basis for computing gain or loss is cost. In this case the cost of the property in which the petitioner "became seized of the entire estate" (Safe Deposit & Trust Co. v. Tait, 295 Fed. 429) was $13,000, and she sold it in [fol. 16] the taxable year for $40,000. We think it does not matter that a part of the cost was supplied by the other spouse. If it be considered that the part contributed by the deceased spouse was a gift, then the basis as to such part is the fair market value at the time of the gift. Section 204(a) (4) of the Revenue Act of 1924. As the property here was acquired for cash, the presumption is that the cash paid is the measure of such value.

Accordingly, we hold that the gain realized by petitioner on the sale of the property in 1925 was the difference between cost of $13,000 and selling price of $40,000, subject to adjustment for improvements as stipulated, which will be settled under Rule 50. The taxes and interest accrued at the time of decedent's death, and which were included as liabilities of his estate, are not proper deductions from petitioner's income, and this will be adjusted in the Rule 50. settlement.

Reviewed by the Board.

Decision will be entered under Rule 50.

BEFORE UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 43518

MRS. FANNIE E. LANG, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Decision

Pursuant to findings of fact and opinion promulgated June 24, 1931, the respondent herein, to-wit, on July 16, 1931 having filed a proposed redetermination for the year 1925, and the petitioner on July 31, 1931, having filed notice of acquiescence to the said proposed redetermination, it is

[fol. 17] Ordered and decided that there is a deficiency for the year 1925 in the amount of $1,355.81.

Enter.

Entered Aug. 7, 1931.

(Signed) Charles P. Smith, Member.

vlh.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION FOR REVIEW—Filed Feb. 1, 1932

Petition of Mrs. Fannie E. Lang for a Review by the United States Circuit Court of Appeals for the Fourth Circuit of a Decision by the United *United* Board of Tax Appeals, Determining a Deficiency for the Year 1925, in the amount of $1,355.81.

(Filed August 7th, 1931.)

Mrs. Fannie E. Lang, the petitioner in -his cause, by Washington Bowie, Jr., Counsel, hereby files her petition for review by the United States Circuit Court of Appeals for the Fourth Circuit of the decision of the United States Board of Tax Appeals rendered on August 7th, 1931, 23 B. T. A. 854, determining a deficiency in the petitioner's Federal income tax on account of the year 1925, in the amount of $1,355.81, and respectfully shows:

[fol. 18] I

The petitioner, Mrs. Fannie E. Lang, is a citizen of the State of Maryland, residing in Catonsville, Maryland.

II

Nature of the Controversy

The controversy involves the proper determination of the petitioner's liability for Federal income taxes for the calendar year 1925.

In 1915 Walter B. Lang and his wife, the petitioner, purchased a piece of residential property in Catonsville, Maryland, at a cost of $13,000, of which amount the husband con-

tributed $11,540 and the petitioner $1,560. Title was taken by the purchasers as tenants by the entireties. Thereafter certain permanent improvements were made on the property at a cost of $1,500, all of which was paid by the husband.

Petitioner's husband died in 1924. Said real estate then had a market value of $40,000.

Said real estate was included in the estate tax return filed by the petitioner as executrix at $35,200, this being 88% of the value at the time of death, which percentage represents the proportion of cost paid by the decedent. The Federal estate tax was paid, based on the net estate as returned by the executrix.

Said real estate was sold by the petitioner on or about July 1st, 1925, for $40,000. The selling expenses amounted to $2,055.80, which amount has been allowed by the respondent in determining the profit realized on the sale.

The Commissioner of Internal Revenue held that a profit accrued to the petitioner, arrived at by taking the difference between the cost price of said property when purchased by Walter B. Lang and the petitioner in 1915 and the price at which it was sold in 1925 and this determination was upheld by the United States Board of Tax Appeals.

[fol. 19]

III

The said Mrs. Fannie E. Lang being aggrieved by the finding of fact and conclusions of law contained in the said finding and opinion of the Board and by its decision entered pursuant thereto, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Fourth Circuit.

IV

Assignments of Error

The petitioner assigns as error the following acts and omissions of the Board of Tax Appeals:

1. The holding that the gain realized by petitioner on the sale of a piece of real estate; purchased in 1915 and held by petitioner and her husband as tenants by the entireties until said husband's death in 1924; was the difference be-

tween the cost of $13,000 and the selling price of $40,000, subject to adjustment for improvements as stipulated.

2. The failure to find that the basis for determining the taxable gain on the sale of said real estate held by petitioner and her husband as tenants by the entireties, is the sum of the cost contributed by petitioner towards its purchase and the value of her husband's interest in it at the time of his death.

3. The finding of a deficiency for the year 1925 in lieu of a determination that there was no income tax due from the petitioner for the year in controversy.

(Signed) Washington Bowie, Jr., Counsel for Petitioner, 616 Fidelity Building, Baltimore, Maryland.

Duly sworn to by Washington Bowie, Jr. Jurat omitted in printing.

[fol. 20] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PRÆCIPE FOR RECORD—Filed March 30, 1932

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, with reference to petition for review heretofore filed by the petitioner in the above cause, a transcript of the record in the above cause, prepared and transmitted as required by law and by the rules of said Court, and to include in said transcript of record the following documents or certified copies thereof, to wit:

(1) The docket entries of all proceedings before the Board of Tax Appeals.

[fols. 21 & 22] (2) Pleadings before the Board of Tax Appeals, as follows:

(a) Petition for redetermination

(b) Answer of the respondent

(c) Amended answer of the respondent

(3) The findings of fact and opinion of the Board of Tax Appeals.

(4) The decision of the Board.

(5) The petition for review, filed by the petitioner in the above cause.

(6) This Præcipe.

(S.) Washington Bowie, Jr. Washington Bowie, Jr., Attorney for Petitioner.

Service of copy of the within Præcipe for Record is admitted this 30th day of March, 1932.

C. M. Charest, Attorney for Respondent.

Clerk's certificate to foregoing transcript omitted in printing.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 3302.

Mrs. Fannie E. Lang, Petitioner,

versus

Commissioner of Internal Revenue, Respondent.

On Petition to Review the Decision of the United States Board of Tax Appeals.

April 14, 1932, the transcript of record is filed and the cause docketed.

Same day, certified copy of order extending the time for transmission and delivery of the record to April 16, 1932, is filed.

Same day, copy of order extending the time for the preparation of evidence and the transmission and delivery of the documents by the Clerk of the Board of Tax Appeals to the Clerk of this Court for a period of ten days is filed.

Same day, the appearance of Washington Bowie, Jr., is entered for the petitioner.

April 22, 1932, the appearance of G. A. Youngquist, Assistant Attorney General; Sewall Key, Special Assistant to the Attorney General; C. M. Charest, General Counsel, Bureau of Internal Revenue, and O. J. Tall, Special Attorney, Bureau of Internal Revenue, is entered for the respondent.

April 29, 1932, twenty-five copies of the printed record are filed.

June 17, 1932, the appearance of Wm. Cutler Thompson, Special Assistant to the Attorney General, and J. Louis Monarch, Special Assistant to the Attorney General, is entered for the respondent.

ARGUMENT OF CAUSE.

June 24, 1932 (June term, 1932), cause came on to be heard before Northcott and Soper, Circuit Judges, and Watkins, District Judge, and is argued by counsel and submitted.

OPINION.

Filed October 3, 1932.

UNITED STATES CIRCUIT COURT OF APPEALS

Fourth Circuit.

No. 3302.

Mrs. Fannie E. Lang, Petitioner,

versus

Commissioner of Internal Revenue, Respondent.

On Petition to Review the Decision of the United States Board of Tax Appeals.

(Argued June 24, 1932. Decided October 3, 1932.)

Before NORTHCOTT and SOPER, Circuit Judges, and WATKINS, District Judge.

WASHINGTON BOWIE, JR., for Petitioner, and J. LOUIS MONARCH, Special Assistant to the Attorney General, (G. A. YOUNGQUIST, Assistant Attorney General; SEWALL KEY and WM. CUTLER THOMPSON, Special Assistants to the Attorney General; C. M. CHAREST, General Counsel, Bureau of Internal Revenue, and O. J. TALL, Special Attorney, Bureau of Internal Revenue, on brief) for Respondent.

NORTHCOTT, Circuit Judge:

This is a petition to review a decision of the United States Board of Tax Appeals (23 B. T. A. 854), affirming a determination of a deficiency in income tax, by the Commissioner of Internal Revenue, against the petitioner, for the year 1925, in the amount of $1,355.81.

In 1915, Walter B. Lang and his wife, the petitioner purchased a piece of residential property in Catonsville, Maryland, at a cost of $13,000, of which amount the husband contributed $11,440, and the petitioner, $1,560. Title was taken by the purchasers as tenants by the entireties. Thereafter certain permanent improvements were made on the property at a cost of $1,500, all of which was paid by the husband.

Petitioner's husband died in 1924. The real estate then had a market value of $40,000. The petitioner was executrix and the sole beneficiary of his estate.

Said real estate was included in the estate tax return filed by the petitioner, as executrix, at $35,200, this being 88 per cent of the value at the time of death, which percentage represents the portion of cost paid by the decedent. A federal estate tax was paid based on the net estate as returned by the executrix.

The real estate was sold by petitioner on or about July 1, 1925, for $40,000. The selling expenses amounted to $2,055.80, which amount has been allowed by the respondent in determining the profit realized on the sale.

In 1925, petitioner paid and deducted in her return for that year, interest charges amounting to $6,298.49, of which the sum of $2,846.52 had accrued prior to her husband's death, and was included in the liabilities of his estate. In that year she also paid, and claimed as a deduction in her return, the sum of $1,431.93 for local property tax. Of this amount, $761.96 had accrued prior

to her husband's death, and was included among the liabilities of his estate.

In his determination of the deficiency respondent (a) used cost in 1915 as a basis for computing the amount of profit realized on the sale of the real estate and in his computation allowed $2,500 for improvements to the real estate; (b) disallowed $3,583.71 of the interest deduction on the ground that such amount had accrued prior to the death of petitioner's husband, and (c) allowed the sum of $1,431.93 as a deduction for local property taxes.

Petitioner's contention is that in determining the deficiency the Commissioner went back to the time of the acquisition of the property and treated it, for income tax purposes, as though the husband had never had any rights therein at all, when the correct basis for determining the value of the property in question, for purposes of taxation, should have been the amount she contributed towards the purchase of the property in 1915 plus the value of her husband's interest in it at the time of his death.

The statutes and regulations involved are the following:

"Revenue Act of 1926, c. 27, 44 Stat. 9.

"Sec. 204. (a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

"(4) If the property was acquired by gift or transfer in trust on or before December 31, 1920, the basis shall be the fair market value of such property at the time of such acquisition;

"(5) If the property was acquired by bequest, devise, or inheritance, the basis shall be the fair market value of such property at the time of such acquisition. The provisions of this paragraph shall apply to the acquisition of such property interests as are specified in

subdivision (c) or (e) of section 402 of the Revenue Act of 1921, or in subdivision (c) or (f) of section 302 of the Revenue Act of 1924, or in subdivision (c) or (f) of section 302 of this Act;

* * * * *

"Sec. 213. * * *

(a) The term "gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

"(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse * * * : PROVIDED further, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

* * * * *

"Treasury Department Regulations 69:

"Art. 1591. Basis for determining gain or loss from sale.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, is, in general, the cost of such property. This general rule is, however, subject to the exceptions set forth in section 204 and articles 1592-1602. The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, is—

"(1) The cost of such property (or, in the case of such property as is described in paragraphs (1), (4), and (5) of section 204 (a) and articles 1592 and 1594, the basis therein provided), or

"(2) The fair market value of such property as of March 1, 1913, whichever is greater.

"What the fair market value of property was on March 1, 1913, is a question of fact to be established by competent evidence. In determining the fair market value of stock in a corporation, due regard shall be given to the fair market value of the corporate assets on the basic date. In the case of property traded in on public exchanges, actual sales at or about the basic date afford evidence of value, but in each case the nature and extent of the sales and the circumstances under which they were made must be considered. Thus, prices received at forced sales or prices received for small lots of property may be no real indication of the value of the property.

"Art. 1594. Property acquired by gift or transfer in trust on or before December 31, 1920, or by bequest, devise, or inheritance.—In computing the gain or loss from the sale or other disposition of property acquired by gift or by a transfer in trust on or before December 31, 1920, or by bequest, devise, or inheritance, the basis shall be the fair market price or value of such property

at the time of acquisition. The term "property acquired by bequest, devise, or inheritance" as used herein includes (except in case of a *bona fide* sale for an adequate and full consideration in money or money's worth)—

"(a) Such property interests as the taxpayer has received as the result of a transfer, or creation of a trust, in contemplation of or intended to take effect in possession or enjoyment at or after death; and

"(b) Such property interests as the taxpayer has received as the result of the exercise by a person of a general power of appointment (1) by will or (2) by deed executed in contemplation of or intended to take effect in possession or enjoyment at or after his death.

"In the case of property acquired by gift, bequest, devise, or inheritance, prior to March 1, 1913, the gain or loss from the sale or other disposition thereof shall be computed upon the basis provided in section 204 (b) and article 1591.

"In the case of property acquired by bequest, devise, or inheritance, its value as appraised for the purpose of the Federal estate tax or in the case of estates not subject to that tax, its value as appraised in the State court for the purpose of State inheritance taxes shall be deemed to be its fair market value when acquired."

A study of the statutes and regulations, above set out, shows that in order to sustain the contention made on behalf of petitioner it must be concluded that, on the death of her husband in 1924, she acquired some interest in the property in question by "bequest, devise or inheritance" (Sec. 204a (5)). It is claimed that *United States* vs. *Tyler*, 33 Fed. (2) 724, decided by this court, and *Tyler* vs. *United States*, 281 U. S. 497, sustain the position that "something" passed to petitioner on the death of her husband that was in the nature of an "inheritance", and that consequently, the value of the property, in computing petitioner's profit for income tax pur-

poses, should be fixed as of the date of the husband's death.

Mr. Justice Sutherland said in *Tyler* vs. *United States, supra*:

"The decisions of the courts of Maryland and Pennsylvania follow the common law and are in accord in respect of the character and incidents of tenancy by the entirety. In legal contemplation the tenants constitute a unit; neither can dispose of any part of the estate without the consent of the other; and the whole continues in the survivor. In Maryland, such a tenancy may exist in personal property as well as in real estate. These decisions establish a state rule of property, by which, of course, this court is bound. *Warburton* vs. *White*, 176 U. S. 484, 496."

In *Cunningham* vs. *Cunningham*, 158 Md. 372, the court says:

"That (the tenancy by the entireties) was an estate which vested in the plaintiff by virtue of the conveyance to her husband and herself prior to his death. The effect of the grant was to clothe each of them with the entire title subject to termination as to either by his or her death in the lifetime of the other spouse. *Marburg* vs. *Cole*, 49 Md. 411; *Jordan* vs. *Reynolds*, 105 Md. 288, 66 Atl. 37; *Frey* vs. *McGaw*, 127 Md. 23, 95 Atl. 960; *Ades* vs. *Caplin*, 132 Md. 66, 103 Atl. 94."

In discussing the statute that was involved in the case of *Tyler* vs. *United States, supra*, Mr. Justice Sutherland also said:

"Section 201 imposes the tax 'upon the transfer of the net estate'; and if that section stood alone, the inclusion of such property in the gross estate of the decedent probably could not be justified by the terms of the statute."

The death duty held properly imposed in that case was only sustained because Congress expressly used the

words "tenant in (by) the entirety". In the statute here under consideration there is no such express use or enumeration of estates by the entirety, and it follows that if they cannot be regarded as "inheritances" the property in question, under the Maryland law, must be regarded for income tax purposes as being acquired by the petitioner at the time she and her husband purchased it, and valued as of that date and not as of the date of her husband's death.

In the Tyler case Mr. Justice Sutherland goes on to say:

* * * * *

"The question here, then, is not whether there has been, in the strict sense of that word, a "transfer" of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty, or anything else it sees fit), to be measured, in whole or in part, by the value of such rights."

* * * * *

"To include in the gross estate, for the purpose of measuring the tax, the value of property, no part of which originally belonged to one spouse, but which came to the tenancy, mediately or immediately, as a pure gift from the other, and which, as a consequence of the latter's death, was relieved from restrictions imposed by the law in respect of tenancy by the entirety so as to produce in the survivor the right of sole proprietorship, is obviously neither arbitrary nor capricious. The evident and legitimate aim of Congress was to prevent an avoidance, in whole or in part, of the estate tax by this method of disposition during the lifetime of the spouse who owned the property, or whose separate funds had been used to procure it; and the provision under review is an adjunct of the general scheme of taxation of which

it is a part, entirely appropriate as a means to that end. *Taft* vs. *Bowers*, 278 U. S. 470, 482."

Properly analyzed the decision of the Supreme Court in the Tyler case, in our opinion, supports the decision of the Board of Tax Appeals in the present case.

Congress, as is its right, has specifically designated the character of transfers to which the standard of value at the time of acquisition shall apply, and has omitted including estates by the entirety, while in the statute under consideration in the Tyler case it (Congress) expressly included such estates.

There is no merit in the contention made that the imposition of the tax here would result in double taxation. The two taxes differ in kind and incidence, and, as was said by the Board in its decision, "fall upon different persons; the estate tax on decedent's estate, and the income tax on the petitioner".

The legal fictions surrounding an estate by the entirety are unquestionably of value, and such estates once created should not be allowed to escape necessarily incident and proper burdens of taxation.

The decision of the Board of Tax Appeals is

Affirmed.

JUDGMENT.

Filed and Entered October 8, 1932.

UNITED STATES CIRCUIT COURT OF APPEALS

Fourth Circuit.

No. 3302.

Mrs. Fannie E. Lang Petitioner,

vs.

Commissioner of Internal Revenue, Respondent.

On Petition to Review the Decision of the United States Board of Tax Appeals.

THIS CAUSE came on to be heard on the transcript of the record from the United States Board of Tax Appeals, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the decision of the said Board of Tax Appeals, in this cause, be, and the same is hereby affirmed.

ELLIOTT NORTHCOTT,
U. S. Circuit Judge.

October 8, 1932.

On another day, to-wit, November 8, 1932, the mandate of this Court in this cause is issued and transmitted to the United States Board of Tax Appeals at Washington, D. C., in due form.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, CLAUDE M. DEAN, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause, as the same remains upon the records and files of the said Circuit Court of Appeals.

IN TESTIMONY WHEREOF, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 20th day of December, A. D. 1932.

(Seal of Court)

CLAUDE M. DEAN, Clerk,
U. S. Circuit Court of Appeals,
Fourth Circuit.

[fol. 35] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 6, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,292. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 595. Mrs. Fannie E. Lang, petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed January 4, 1933. File No. 37,292.